No. 73-1513

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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UNITED STATES OF AMERICA, PETITIONER

v.

RONALD S. JENKINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-41a) is reported at 490 F. 2d 868. The opinion of the district court, which is contained in a document entitled "Findings of Fact and Conclusions of Law" (App. B, *infra*, pp. 42a-52a), is reported at 349 F. Supp. 1068.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1973 (App. C, *infra*, pp. 53a-54a). A timely petition for rehearing was denied on February 6, 1974 (App. D, *infra*, pp. 55a-56a). By order of February 28, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including April 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the United States from appealing an order of the district court dismissing an indictment, after a trial without a jury, where the district court found that the defendant committed the acts charged in the indictment but concluded as a matter of law that the defendant had established an affirmative defense, and where the error of the district court can be corrected without a retrial.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

18 U.S.C. 3731, as amended by Title III of the Omnibus Crime Control Act of 1970, 84 Stat. 1890, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

1. In an indictment returned in the United States District Court for the Eastern District of New York, respondent, a registrant under the Universal Military Training and Service Act, was charged with having "knowingly failed and neglected to perform a duty required of him under and in the execution of said Act and Regulations, by knowingly refusing and failing to submit to induction into the armed forces of the United States, after notice had been given to the defendant by Local Board No. 50, exercising jurisdiction in that behalf, requiring the defendant to report for induction on the 24th day of February, 1971," in violation of 50 U.S.C. App. 462(a) (C.A. App. A-1).

The case was tried before the district court without a jury. On October 24, 1972, the district court filed a document entitled "Findings of Fact and Conclusions of Law" (App. B, *infra*, pp. 42a-52a). The district court found that, as charged in the indictment, "the Local Board mailed to defendant * * * an

Order to Report for Induction on February 24, 1971," which was received by him, and that "[t]he defendant did not report for induction on February 24, 1971" (*id.* at 43a-44a).[1]

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[1] The "Findings of Fact" were as follows:

1. The defendant, RONALD S. JENKINS, is charged in a one count indictment with violation of 50 U.S.C. App. § 462(a), for failure to comply with an induction order to report and submit to induction into the Armed Forces.

2. Defendant registered with Local Board No. 50, Brooklyn, New York, on September 23, 1966.

3. On October 19, 1966, the defendant was placed in Class 2-S by the Local Board and such classification remained on an annual basis until November 18, 1970, when he was placed in Class 1-A by the said Local Board No. 50.

4. On January 20, 1971, the defendant was given a pre-induction physical at the Armed Forces Examination and Entrance Station, and was found to be medically qualified for induction.

5. On February 4, 1971, the Local Board mailed to defendant an SSS Form 252, an Order to Report for Induction on February 24, 1971.

6. On February 17, 1971, after receiving his induction notice, the defendant wrote to the Local Board and requested SSS Form 150 for a conscientious objector classification.

7. On February 23, 1971, the defendant went in person to the Local Board and requested Form 150. He was advised to write a short statement as to his beliefs, which he did, and he was told to report for induction on the next day because his request for a postponement of his induction had been denied.

8. The defendant did not report for induction on February 24, 1971.

9. The defendant's SSS Form 150 was received by the Local Board on March 30, 1971.

The district court then proceeded, under the heading "Discussion," to discuss respondent's defense to the indictment "that at the time of his alleged commission of the crime, viz., his refusal to submit to induction, the law of the Second Circuit [since overruled by *Ehlert* v. *United States*, 402 U.S. 99] was such that he was entitled to a postponement of his induction to enable the Board to pass on his claim for C.O. status" (App. B, *infra*, p. 44a), a claim which he had concededly asserted for the first time *after* receiving his notice to report for induction (*id.* at 43a).

The district court agreed with respondent's claim regarding the applicable law of the Second Circuit at the time the local board declined to reopen his classification, and it concluded further that "the defendant JENKINS would be [prejudiced] by a retroactive application of *Ehlert*," presumably because he may have refused induction in the belief that he had a right to be heard on his late crystallization claim prior to being compelled to report for induction[2] (*id.* at 50a). Accordingly, the district court con-

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[2] The district court made no express finding that Jenkins had in fact relied on "the applicable law of the Second Circuit." The reason for the absence of such finding is that neither the respondent nor the draft counselor with whom he consulted, and who was called to testify to respondent's sincerity (C.A. App. A-144), testified that they had relied on "the applicable law of the Second Circuit." Respondent's claim was that the local board was bound to follow "the applicable law of the Second Circuit" (even though that "law" was subsequently held to be erroneous) and that the lawfulness of the local board's action must be viewed in light of the law at the time.

cluded that it "cannot permit the criminal prosecution of the defendant under these circumstances without seriously eroding fundamental and basic equitable principles of law" (*id.* at 52a). Under the heading "Conclusions of Law," the district court stated that "[t]he indictment in this case is dismissed and the defendant is discharged" (*ibid.*).

2. Shortly after this decision, the Court of Appeals for the Second Circuit decided *United States* v. *Mercado*, 478 F. 2d 1108, which cast serious doubt on the legal conclusion of the district court. There, discussing the effect of *Ehlert* v. *United States*, 402 U.S. 99, on pre-*Ehlert* refusals to report for induction, the court of appeals stated that "[u]pholding the conviction of a registrant who claims to have relied on the pre-existing case law would appear to be no more than an application of the settled rule that an erroneous belief that an induction order is invalid, even if based on the advice of counsel, is not a defense to a prosecution for refusing induction, and that one who refuses induction on the basis of such a belief acts at his peril" (478 F. 2d at 1111). Moreover, while the court of appeals recognized that such a rule may operate harshly "as applied to a registrant who in fact reasonably relied in good faith on the case law," no such showing could be made by a registrant (like respondent) who refused induction in the early part of 1971, "when there was widespread disagreement among the courts of appeals and the question had been argued and was pending decision in the Supreme Court" (*ibid.*).

Since the order of the district court here conflicted with the holding of the district court in *Mercado*, which was then pending on appeal from a judgment of conviction, the Solicitor General authorized an appeal to the court of appeals pursuant to the Criminal Appeals Act, 18 U.S.C. 3731. The Act, which was adopted to "assure that the United States may appeal [to the court of appeals] from the dismissal of a criminal prosecution by a district court in all cases where the Constitution permits,"[3] authorizes an appeal to the court of appeals from a decision, judgment or order of a district court dismissing an indictment "except * * * where the double jeopardy clause of the United States Constitution prohibits further prosecution." Although respondent had been placed in jeopardy, and a dismissal after jeopardy might preclude a second trial, the United States argued that an appeal was not barred by the Double Jeopardy Clause because it was not seeking a retrial, but simply a direction to the district court to enter judgment in accordance with the evidence adduced at the trial.

The court of appeals concluded that Congress intended to authorize an appeal from an order of the district court terminating a criminal prosecution in all cases in which an appeal would not violate the Double Jeopardy Clause (App. A, *infra*, p. 5a):

> Appellant asserts, and appellee does not dispute, that Congress intended to extend the Gov-

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[3] S. Rep. No. 91-1296, "Amendments to the Criminal Appeals Act," 91st Cong., 2d Sess., pp. 2-3.

> ernment's right of appeal in criminal cases as far as it constitutionally could. If the language of the statute left any doubts on that score, they would be set at rest by the report of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., No. 91-1296, at 4-13. The appeal here will therefore lie unless the Double Jeopardy clause prevents interference with appellant's acquittal.

The majority of the court of appeals, however, over the dissent of Judge Lumbard, held that an appeal was barred by the Double Jeopardy Clause. The majority reasoned that, "for double jeopardy purposes," the district court judge had acquitted the respondent (*id.* at 26a):

> His ruling was based on facts developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case. The dissent here contends that the district court's findings of fact were largely undisputed and not relevant to the pivotal legal issue in question. However, the discussion section of the district court's opinion makes it clear that it was relying on the precise circumstances of Jenkins' case to conclude that the Supreme Court's decision in *Ehlert* should not be applied retroactively to him. The district court was not construing the statute, which had been authoritatively interpreted in *Ehlert*, and holding that Jenkins did not come within it as a matter of law. It was holding that the statute should not be applied to him as a matter of fact.

Although a reversal of the order of the district court would not have necessitated a retrial, but only

a direction to the district court to enter a judgment in accordance with its findings, the court of appeals held that the Double Jeopardy Clause barred an appeal—that, in effect, the appeal itself placed the defendant in jeopardy a second time.[4] In reaching this conclusion the court of appeals relied principally on what it characterized (App. A, *infra*, p. 16a) as the "dictum" in *United States* v. *Ball*, 163 U.S. 662, 671, that an acquittal can "not be reviewed, on error or

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[4] The majority opinion below indicated that it was "not certain" that, if it agreed that the district court had erroneously dismissed the indictment, further trial proceedings would not be warranted (App. A, *infra*, p. 28a). It noted that in *United States* v. *Mercado*, *supra*, it had recognized the possibility of a successful defense by "a registrant who in fact reasonably relied in good faith on the case law or upon the knowledge that local boards in this circuit would consider a belated conscientious objection claim" (478 F. 2d at 1111). The court of appeals nevertheless did not resolve this issue, but decided the double jeopardy issue on the assumption that there would be no "need for a second trial" (App. A, *infra*, p. 28a).

We merely observe that, in indicating uncertainty regarding the possible need for further proceedings, the court of appeals apparently overlooked the fact that respondent had refused induction during that period of time when *Mercado* held it would have been impossible to establish justifiable reliance on existing law. And respondent could not have relied on a belief that his claim would be considered by the local board, because the district court found that respondent was advised the day before he was due to report for induction that his request for a postponement had been denied (App. B, *infra*, p. 44a). Moreover, even if additional proceedings were necessary, it would not have been a "retrial" of issues previously litigated (*King* v. *United States*, 426 F. 2d 278, 279 (C.A. 9)), but merely a reopening of the defense case to permit respondent to introduce evidence which he should have put in during his defense at trial.

otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." While the court of appeals found that this dictum had been followed in subsequent cases (*Kepner* v. *United States*, 195 U.S. 100; *Fong Foo* v. *United States*, 369 U.S. 141; and *United States* v. *Sisson*, 399 U.S. 267), it suggested that a "[r]eexamination of the dictum in *Ball* * * * may well be desirable, particularly now that the Double Jeopardy Clause has been extended to the states"; it concluded, however, that "this is far beyond our power as an inferior court" (App. A, *infra*, pp. 29a-30a, n. 20).

Judge Lumbard, who dissented from the holding of the majority, concluded that "the Double Jeopardy Clause is not an abstract rule, but one that should be adapted and applied in light of the totality of circumstances of each particular case" (App. A, *infra*, pp. 40a-41a):

> An unalterable rule that the Double Jeopardy Clause bars all government appeals from acquittals, fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice. Only last term, the Supreme Court in *Illinois* v. *Somerville*, 410 U.S. 458 (1973), rejected the notion that technical errors resulting in a mistrial should bar reprosecution. In such cases, the "ends of public justice" demand that "the purpose of law, to protect society from those guilty of crimes [not] be frustrated by denying courts power to put the defendant to trial again." 410 U.S. at 470.
>
> I believe that the "ends of public justice" will not be served if we permit a defendant who is clearly guilty to go free because of the trial judge's erroneous interpretation of the controlling law. That Jenkins is guilty would appear to be indisputable in light of our decision in *United States* v. *Mercado*, 478 F.2d 1108 (1973), in which we held without reservation that even prior to *United States* v. *Ehlert*, the law of this circuit was that an individual had to report for induction although his post-induction notice claim for conscientious objector status was still pending.
>
> Accordingly, I would vacate the order of the court below and remand for a proper application of the law. [Footnote omitted.]

REASONS FOR GRANTING THE WRIT

1. The Criminal Appeals Act, as amended by the Omnibus Crime Control Act of 1970, 84 Stat. 1890, was expressly intended to authorize an appeal from an order of a district court terminating a criminal prosecution in all cases in which such an appeal would not violate the Double Jeopardy Clause. Although it was anticipated that the revised Criminal Appeals Act, unlike its predecessor, would provide a clear, rational scheme governing appeals by the United States (*United States* v. *Sisson*, 399 U.S. 267, 306-307, n. 61, and 307-308, "[t]his appeal by the United States from a judgment of the District Court for the Eastern District of New York dismissing an indict-

ment after a bench trial [as the court of appeals observed] is the latest in a growing list of cases showing that the eagerly awaited 1970 amendment of the Criminal Appeals Act, 18 U.S.C. § 3731, has not resolved all the problems in this area" (App. A, *infra*, p. 2a). The principal reason for the growing conflict and uncertainty,[5] however, does not arise from the language of the Act, which has been consistently construed to authorize appeals by the United States in criminal cases "as far as [Congress] constitutionally could" (*id.* at 5a),[6] but from the cases construing the Double Jeopardy Clause—cases which, as one commentary has observed, are "frequently both illogical and irreconcilable." Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life For A Moribund Constitutional Guarantee*, 65 Yale L.J. 339 (1956).

This case presents the Court with an opportunity to clarify and reconcile some of the past decisions construing the Double Jeopardy Clause, and to do so in the context of a case which will have broad ramifications and application to a wide variety of situations. The holdings of the court of appeals—(1) that a defendant is acquitted "for double jeopardy purposes" whenever a district court sustains an affirmative defense (or other legal claim going to the merits) on the basis of facts developed at trial; and (2) that the Double Jeopardy Clause bars appellate review of that determination, even where a retrial is not necessary to correct the error of the district court—will directly affect the right of the United States to appeal to the court of appeals in two significant areas in which errors of a district court may be corrected without the necessity of a retrial. Under the reasoning of the court of appeals, it will be impossible for the United States to appeal from (1) post-trial dismissal orders in cases tried without a jury, where findings of fact are made[7] that require conviction, but where the district court, because of an error of law, has sustained an affirmative defense or other legal claim going to the merits, and (2) all post-conviction dismissal orders in cases tried by a jury (where the verdict of guilty is the equivalent of the findings of fact made here by the district court), sustaining affirmative defenses or other legal claims going to the merits.

Moreover, if permitted to stand, the holding below will create another illogical and irreconcilable precedent in this area. For example, had the district court here entered a judgment of conviction, and had the defendant prevailed on his defense in the court of appeals, that order would have been as much an "acquittal for double jeopardy purposes" as was the

[5] There are two petitions for certiorari presently pending, one filed by the United States (*United States* v. *Wilson*, No. 73-1395) and one filed by a defendant (*Serfass* v. *United States*, No. 73-1424), raising separate but related issues, which demonstrate the conflict and confusion presently pervading this entire area (see pp. 21-24, *infra*).

[6] Because we agree with the court of appeals' construction of the statute, our discussion herein is confined to the constitutional issue presented.

[7] Fed. R. Crim. P., Rule 23(c).

order of the district court. If a subsequent appeal in effect places the defendant in jeopardy a second time, even though a retrial is not sought, then a petition for certiorari would likewise be barred. Since this is clearly not the law, *Forman* v. *United States*, 361 U.S. 416, 426, the illogical consequence of the holding of the court of appeals is that the action of a single district court judge terminating a criminal prosecution is final and unappealable even though a retrial is not sought, but the holding of three judges of the court of appeals to the same effect is not final and is subject not only to rehearing *en banc* but to review by this Court.

The petition for certiorari should be granted to resolve this anomaly and to clarify the meaning and scope of the Double Jeopardy Clause in an area of substantial importance to the administration of criminal justice in the federal courts. Such clarification is particularly appropriate, as the court of appeals has observed, "now that the Double Jeopardy Clause has been extended to the states" (App. A, *infra*, pp. 29a-30a, n. 20).[8] Review by this Court is also important to insure that the policy of Congress to permit government appeals on questions of law in criminal cases insofar as constitutionally permissible is not being undercut by an unduly broad interpretation of the double jeopardy prohibition.

[8] We note in this regard that the holding of the Court of Appeals for the Second Circuit casts doubt on the validity of statutes, authorizing appeals by the state, which are on the books in every State within its jurisdiction. See New York C.P.L. § 450.20; Conn. Gen. Stat. Ann. § 54-96 (Supp. 1973); Vt. Stat. Ann., Title 13, § 7403.

2. The court of appeals misconstrued and misapplied the holdings of this Court interpreting the Double Jeopardy Clause. The majority opinion exhaustively traces the genealogy of the Double Jeopardy Clause, but it ultimately ignores both the history and purpose of that provision. The common law rule, which the Double Jeopardy Clause largely reflected (*Kepner* v. *United States*, 195 U.S. 100, 125), was directed to applications by the prosecutor for a new trial following a jury verdict of acquittal. Friedland, *Double Jeopardy*, pp. 285-287 (1969).[9] "The underlying idea," Mr. Justice Black has written for the Court, "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. * * * Thus it is one of the elemental principles of our criminal law that the Government cannot *secure a new trial* by means of an appeal even though an acquittal may appear to be erroneous." *Green* v. *United States*, 355 U.S. 184, 187-188 (emphasis added); *Palko* v. *Connecticut*, 302 U.S. 319, 328.

Here, the court of appeals ignored both the "elemental principle" and the "underlying idea" of the Double Jeopardy Clause by relying for its hold-

[9] It appears that at common law in England an appeal, such as that here, could be taken by the Crown. Friedland, *supra*, at p. 297, nn. 2-3.

ing on "dictum" (App. A, *infra*, p. 16a) in *United States* v. *Ball*, 163 U.S. 662, and on what it characterized as the holding of three other cases,[10] to sustain its conclusion that an appeal by the United States, seeking to correct an error of law by the district court without the necessity of a retrial, places the defendant in jeopardy a second time (App. A, *infra*, p. 29a):

> The short of the matter is this: *Kepner* held that an acquittal on the general issue barred an appellate court from entering a judgment of conviction on appeal. Since under Philippine practice no further proceedings were required below, the decision belies any view that the Double Jeopardy clause protects only against the vexation of a second trial. *Fong Foo* held that a directed acquittal barred a retrial even when it was plain that the acquittal was occasioned by clear error of the judge. *Sisson* held that when a guilty verdict had been nullified by a judge's decision to acquit on the merits, the Double Jeopardy clause prevented an appellate court from directing the entry of a judgment of conviction. We cannot see how in the circumstances here presented the Government can thread a way through this thicket so long as these decisions stand. [Footnote omitted.]

The "thicket," we submit, is not nearly so dense as the majority suggests. *United States* v. *Ball*, 163 U.S. 662, was a case in which "[t]he verdict of the

[10] *Kepner* v. *United States*, 195 U.S. 100; *Fong Foo* v. *United States*, 369 U.S. 141; *United States* v. *Sisson*, 399 U.S. 267.

jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F. Ball of the whole charge * * *" (163 U.S. at 670); it was held there that such a verdict "could not be reviewed, on error or otherwise, without putting him twice in jeopardy" because "a verdict of acquittal * * * is a bar to a subsequent prosecution for the same offence" (163 U.S. at 671). The acquittal in *Ball*, on a general verdict, was tantamount to a finding of fact that he had not done the acts charged. Accordingly, the "dictum" lends no support to the holding below, since the defendant here was, in effect, found guilty of the acts charged in the indictment, and the dismissal order was based on application of a legal principle to undisputed facts. Moreover, the correction of that error will not involve "a subsequent prosecution for the same offence."

Kepner v. *United States*, 195 U.S. 100, was a case in which the defendant had been tried in the Philippines without a jury and acquitted by the trial judge. Under Philippine law an appeal was authorized from such an acquittal, and the appellate court had the authority to make *de novo* findings of fact on appeal. Citing *United States* v. *Ball*, *supra*, the Court held that such an appeal is barred by the Double Jeopardy Clause (195 U.S. at 133):

> The *Ball* case, 163 U.S., *supra*, establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government.

> *The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense* * * *. [Emphasis added.]

The trial "upon the merits" to which the Court alluded in *Kepner* resulted from the peculiar nature of the appellate review afforded by Philippine law, pursuant to which, in Kepner's case, the appellate tribunal weighed the credibility of witnesses, made new findings of fact, and entered a judgment of conviction. But it cannot reasonably be maintained that when an appellate court determines that the district court erred as a matter of law in dismissing an indictment, and accepts as true all of the facts found by the district court, it is conducting a retrial on the merits.[11] Certainly *Kepner* stands for no such proposition.

Moreover, this consideration aside, it must be remembered that *Kepner* did not involve a construction of the Double Jeopardy Clause, but the construction of an Act of Congress, applicable to the Philippines, which incorporated the double jeopardy principle. While it is true that, in the course of the opinion

[11] On this analysis, this Court has been violating the Double Jeopardy Clause for years by granting petitions for writs of certiorari in cases where courts of appeals, accepting as true the findings of the trier of fact, have ordered dismissal of indictments on the merits, based on their application of legal principles to undisputed facts. See, *e.g.*, *United States* v. *Maze*, No. 72-1168, decided January 8, 1974; *United States* v. *Russell*, 411 U.S. 423; *United States* v. *Seeger*, 380 U.S. 163.

in *Kepner*, the Court indicated that it regarded the statutory provision as having the same effect as the Fifth Amendment, this Court has subsequently admonished that such language is to be regarded as dictum and is not "conclusive" in cases "where the interpretation of the Fifth Amendment is necessarily decisive" (*Green* v. *United States*, 355 U.S. 184, 197, n. 16).[12] See also, *Abbate* v. *United States*, 359 U.S. 187, 198, n. 2 (separate opinion of Mr. Justice Brennan).

Equally inapposite is *Fong Foo* v. *United States*, 369 U.S. 141, which involved a directed verdict of acquittal in a jury trial and in which the relief sought would have required "that the petitioners be tried again for the same offense" (369 U.S. at 143).[13] Here, as we have emphasized, no such retrial will result.

The last case upon which the majority relied is *United States* v. *Sisson*, 399 U.S. 267. There, after a jury had convicted the defendant of failing to report for induction, the district court in effect terminated the prosecution on the basis of its conclusion that under applicable legal principles the evidence was insufficient to sustain the defendant's guilt. The Court held that this was in effect an acquittal and

[12] In *Green*, the Court was referring to *Trono* v. *United States*, 199 U.S. 521, a case decided a year after *Kepner*, which also involved an interpretation of the statutory double jeopardy provision applicable in the Philippines.

[13] The continuing vitality and scope of *Fong Foo* is somewhat uncertain in light of this Court's recent decision in *Illinois* v. *Somerville*, 410 U.S. 458.

that an appeal to this Court was not authorized under the old Criminal Appeals Act. After so holding the Court added the following dictum (399 U.S. at 289-290):

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution * * *. [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence," *United States* v. *Ball*, 163 U.S. 662, 671 (1896).

This dictum, however, had little relevance to the case before the Court, since the United States was not seeking "a subsequent prosecution" of Sisson, but merely to have the district court enter a judgment of conviction in accordance with the jury's verdict. The single case cited by the Court, *United States* v. *Ball*, 163 U.S. 662, as we have shown, involved a verdict of acquittal entered by a jury. Moreover, the language in *Sisson*, like the language in *Ball* and *Kepner*, was wholly unnecessary to this Court's decision."

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[14] Tending to confirm our submission that *Sisson* should not be regarded as dispositive of the double jeopardy issue is the plurity opinion in *United States* v. *Jorn*, 400 U.S. 470. As there stated in discussing *Sisson* (400 U.S. at 478, n. 7):

"It is clear from the record in this case that Judge Ritter's action cannot, as two members of the Court suggest, be classified as an 'acquittal' for purposes of this Court's jurisdiction over the appeal under 18 U.S.C. § 3731. * * * Of course, as we noted in *Sisson*, *supra*, at 290, the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction. But *Sisson* goes on to articulate the criterion of an 'acquittal' for purposes of assessing our jurisdiction to review: the trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case * * *.'"

This language indicates that four members of the Court viewed the holding in *Sisson* solely as one determining "this Court's jurisdiction over the appeal under [the old] 18 U.S.C. 3731." See also the dissenting opinion of Mr. Justice White in *United States* v. *Sisson*, *supra*, 399 U.S. at 328, n. 4 (which was joined by the Chief Justice and Mr. Justice Douglas): "I cannot believe that the majority really means to suggest that Congress could not constitutionally authorize an appeal in a case precisely parallel to this one in accordance with currently sought legislation [the present Section 3731]."

It is thus plain that the "thicket" that the majority below perceived as barring an appeal in these circumstances does not contain a single holding of this Court in which the important issue we seek to raise here has been litigated and resolved. Under these circumstances, we submit, this Court should accept the suggestion of the court of appeals that "the dictum in *Ball* that underlay *Kepner*, *Fong Foo* and *Sisson*" be subjected to the kind of "[r]eexamination" that only this Court is competent to undertake (App. A, *infra*, pp. 29a-30a, n. 20).

3. There are presently pending on petitions for writs of certiorari two other cases raising issues closely related to the issue presented here; if certiorari is granted in those cases, it would also be particularly appropriate to consider at the same time the issue raised here.

a. *Serfass* v. *United States*, No. 73-1424, petition for a writ of certiorari filed March 22, 1974, involves what might be described as the other side of the same double jeopardy coin. There, as here, the defendant sought dismissal of an indictment charging him with failure to report for induction. The basis of the motion to dismiss was that the local board improperly failed to reopen his classification when he made a post-induction-order claim for treatment as a conscientious objector. Serfass made his motion prior to trial, and the district court granted it on the basis of the Selective Service File, Serfass' affidavit, and certain stipulations of counsel. The Court of Appeals for the Third Circuit held that an appeal by the United States would not violate the Double Jeopardy Clause because Serfass had not been placed in jeopardy at the time the indictment had been dismissed. On the merits, it reversed the order of the district court and remanded the case for trial.[15]

If, as we believe, the Court of Appeals for the Third Circuit was correct in *Serfass*, it seems hard to reconcile the result in that case with the conclusion reached below. Jenkins, although guilty, will go free, even though the legal error which caused the order of dismissal may be corrected without a second trial. This is apparently so simply because the district court did not rule before trial on his motion for a judgment of acquittal, which was in fact filed prior

[15] The same result was reached by the Court of Appeals for the Second Circuit a few days after its decision in the instant case. *United States* v. *Velazquez*, 490 F. 2d 29.

to trial.[16] Since the success of the motion did not turn on disputed facts, it could as readily have been acted on before trial as after.

On the other hand, Serfass may go to jail, and will at least be subject to a trial in the district court, because he diligently made and pressed his motion prior to trial. Under those circumstances, the consideration of the propriety of the dismissal by the court of appeals could not be characterized under the logic of the *Jenkins* court as a *re*trial (although perhaps, under the reasoning in *Jenkins*, it was a trial).

This result is unacceptable in terms of the policies reflected by the Double Jeopardy Clause, and we respectfully submit that, if certiorari is granted in either case, it should also be granted in the other, so that a rational and just rule may be formulated.[17]

b. In *United States* v. *Wilson*, No. 73-1395, petition for writ of certiorari filed March 15, 1974, the district court entered an order, after a jury verdict of guilty, dismissing an indictment on the ground of

[16] The only possible explanation for the delay in decision is that the district court may have regarded this written motion, filed prior to trial, to have been intended to support the motion to be made after the evidence was heard at trial. This is particularly probable here because the motion was filed along with motions concerning the *voir dire*, requests to charge the jury, and a trial memorandum of law. C.A. App. A-1. (Respondent ultimately waived a jury trial.)

[17] Since there is a square conflict among the courts of appeals regarding the issue raised in *Serfass*, we have filed a memorandum in that case suggesting that the petition for a writ of certiorari be granted.

unnecessary pretrial delay. The Court of Appeals for the Third Circuit held that this order was an acquittal even though it did not go to the merits. Accordingly, relying on the "dictum" in *United States* v. *Ball*, *supra*, which was quoted in *Sisson*, it held that the Double Jeopardy Clause bars an appeal from an acquittal.[18]

Our petition for certiorari in *Wilson* raises two issues. We challenge the characterization of the order of dismissal as an "acquittal," contending that it is unsound as a matter of law and contrary to definition employed by the Court of Appeals for the Second Circuit (in this case and in *United States* v. *Weinstein*, 452 F. 2d 704, certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917) and the Court of Appeals for the Eighth Circuit (in *United States* v. *Whitted*, 454 F. 2d 642). We also argue that, even if the order can be characterized as an acquittal, an appeal is not barred by the Double Jeopardy Clause. Since, if certiorari is granted in *Wilson*, that case could be resolved (on the definition of an "acquittal") without reaching the Double Jeopardy issue raised here, it is respectfully submitted that, if the issue we have presented is deemed worthy of review, the petition here should be granted along with the petition for certiorari in *Wilson*.[19]

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[18] In *Serfass*, the Court of Appeals for the Third Circuit distinguished *Wilson* as involving a "*post-trial* directed verdict of acquittal" (slip op. 5, n. 1) (emphasis in original).

[19] We are sending counsel for respondent copies of our petition for certiorari in *Wilson* and our memorandum in *Serfass*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APRIL 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEPTEMBER TERM, 1973

No. 79

(Argued September 12, 1973

Decided December 11, 1973)

Docket No. 73-1572

UNITED STATES OF AMERICA, APPELLANT

v.

RONALD S. JENKINS, APPELLEE

Before:

LUMBARD, FRIENDLY and FEINBERG,

Circuit Judges

Appeal by the United States from a judgment of the District Court for the Eastern District of New York, Anthony J. Travia, *Judge*, which, after trial, dismissed an indictment for refusal to submit to induction into the armed forces in violation of 50

U.S.C. App. § 462(a), on the ground that despite the subsequent decision in *Ehlert* v. *United States*, 402 U.S. 99 (1971), defendant was justified in relying on earlier decisions in this circuit requiring the local board to reopen his classification.

Dismissed for lack of appellate jurisdiction.

L. KEVIN SHERIDAN, Assistant United States Attorney (Robert A. Morse, United States Attorney, Eastern District of New York, of Counsel), *for Appellant.*

JAMES S. CARROLL, Esq., New York, N. Y., *for Appellee.*

FRIENDLY, *Circuit Judge:*

This appeal by the United States from a judgment of the District Court for the Eastern District of New York dismissing an indictment after a bench trial is the latest in a growing list of cases showing that the eagerly awaited 1970 amendment of the Criminal Appeals Act, 18 U.S.C. § 3731, 84 Stat. 1890, has not resolved all the problems in this area.[1]

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[1] Although the Supreme Court has applauded the new Act, see *United States* v. *Sisson*, 399 U.S. 267, 307-08, 324-25 (1970); *United States* v. *Weller*, 401 U.S. 254, 255 n.1 (1971), this case and others herein cited show that the amendment has by no means solved all problems in this field.

The statute, so far as here relevant, reads as follows:[2]

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> . . .
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

I.

The indictment here at issue charged that defendant Jenkins, a registrant under the Universal Military Training and Service Act, "knowingly failed and neglected to perform a duty required of him under and in the execution of said Act and Regulations, by knowingly refusing and failing to submit to induc-

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[2] The statute also directs:

> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The judgment in this case was rendered October 24, 1972, and the Government's notice of appeal was filed on November 21, 1972, but its brief was not filed until June 13, 1973. This scarcely conforms with our notion of diligent prosecution and we would have dismissed the appeal on that ground if defendant had so requested. In *United States* v. *Goldstein*, 479 F.2d 1061, 1064 n.4 (2 Cir. 1973), we admonished that, in appeals under 18 U.S.C. § 3731, the Government's brief should ordinarily be filed within 30 days after the notice of appeal.

tion into the armed forces of the United States, after notice had been given to the defendant by Local Board No. 50, exercising jurisdiction in that behalf, requiring the defendant to report for induction on the 24th day of February, 1971," in violation of 50 U.S.C. App. § 462(a).

Jenkins waived trial by jury, and the case was heard by Judge Travia, who later filed an opinion containing findings of fact and conclusions of law. The facts developed at trial were as follows:

After receiving an order to report for induction on February 24, 1971, Jenkins wrote the Local Board asking to be reclassified as a conscientious objector. On the day before his scheduled induction, he went to the draft board and requested Form 150, the conscientious objector application form. In response to his request, a Board representative advised him to draft a brief statement summarizing his beliefs, which he did. The Board then denied his request for postponement of his induction. Jenkins failed to report for induction the next day and subsequently returned his completed Form 150 to the Board.

After extensive discussion, the court concluded that "The indictment in this case is dismissed and the defendant is discharged." Recognizing that in *Ehlert* v. *United States*, 402 U.S. 99, decided on April 21, 1971, the Supreme Court had held that local boards need not consider conscientious objector claims filed by registrants after they receive their induction orders, the judge ruled that *Ehlert* should not be given retroactive effect in this case and that Jenkins' late-

crystallizing conscientious objection claim was a valid defense to the criminal charge under this court's decision in *United States* v. *Geary*, 368 F.2d 144 (2d Cir. 1966), which *Ehlert* disapproved, 402 U.S. at 101 n.3. The Government contends that this ruling is contrary to our recent decision in *United States* v. *Mercado*, 478 F.2d 1108 (2 Cir. 1973), in which we applied *Ehlert* to a registrant with a conscientious objection claim that had allegedly crystallized after notice of induction. Appellee argues that *Mercado* is distinguishable. However, we do not reach that issue since, as we hold, we are without jurisdiction to entertain the Government's appeal.

II.

Appellant asserts, and appellee does not dispute, that Congress intended to extend the Government's right of appeal in criminal cases as far as it constitutionally could. If the language of the statute left any doubts on that score, they would be set at rest by the report of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., No. 91-1296, at 4-13. The appeal here will therefore lie unless the Double Jeopardy clause prevents interference with appellant's acquittal. To determine that question, we must look not merely to the familiar but unilluminating words of the Double Jeopardy clause, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," but also to its historical background, the proceedings leading to its

adoption as part of the Fifth Amendment, and the course of decisions thereunder.

While the precise origin of the protection against double jeopardy is unclear, it is certain that the notion is very old.[3] The Greeks apparently treated the concept as part of a primitive form of *res judicata*. In 355 B.C., Demosthenes stated, "the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort." 1 *Demosthenes* 589 (Vance trans 1962). Justinian's *Corpus Juris Civilis* recognized the special applicability of the principle to criminal proceedings through the maxim that "the governor should not permit the same person to be again accused of crime of which he has been acquitted." 11 Scott, The Civil Law 17 (1932).[4] Similarly, canon law early declared that "there shall not rise up a double affliction," a precept which was ap-

[3] Justice Black characterized the "[f]ear and abhorrence of governmental power to try people twice for the same conduct" as "one of the oldest ideas in western civilization." *Bartkus* v. *Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting). A nineteenth century commentator went even further, asserting that "the principle is a part of that universal law of reason, justice, and conscience, of which Cicero said: 'Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same.'" Bachelder, *Former Jeopardy*, 17 Am. L. Rev. 748 (1883).

[4] Under Roman law the judgment upon an action between a defendant and his accuser was apparently not binding against a second accuser who was not a party to the first action, or at least who was not aware that the first prosecution was being brought. 21 Scott, *supra*, at 17-18.

parently based on the notion that God does not punish twice for the same offense. *Bartkus* v. *Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting). The related principle that clerics could not be punished in the king's court after having been tried under canon law was a major source of the dispute between Becket and Henry II; Becket ultimately prevailed, albeit postumously. 1 Pollock and Maitland, A History of English Law 448-49 (2d ed. 1899). In the thirteenth century, as Bracton reports, the bar against multiple prosecutions assumed a rather grim urgency. Since many criminal offenses were tried by battle between the wronged party and the alleged offender, it was evident that a series of prosecutions would ultimately produce a "conviction" against all but the hardiest combatants, if enough "appealors" were willing to try their hands at the case. Once the defendant had endured one such trial for "one deed and one wound," Bracton wrote, "he will depart quit against all, also as regards the king's suit, because he thereby proves his innocence against all, as though he had put himself on the country and it had exonerated his completely." 2 Bracton, On the Laws and Customs of England 391 (Thorne trans. 1968).[5]

[5] Bracton's generous view of the emerging double jeopardy protection was not shared by his immediate successors. During the thirteenth and fourteenth centuries, a defendant's success in the quasi-criminal action of "appeal" lost its preclusive effect against a subsequent suit by the king, and *vice versa*, although success on an appeal would still bar a second appeal, and success on an indictment would bar a second

By the time of Lord Coke, the nascent double jeopardy concept had begun to mature into a complex of common law pleas, the most prominent of which were *autrefois acquit* and *autrefois convict*. The first, according to Coke, provided that a defendant could block a second trial by proving that he had previously been acquitted of the same offense. Similarly, under *autrefois convict* a defendant could plead a former conviction in bar of a second indictment for the same crime. See 3 Coke, Institutes of the Laws of England 213-14 (1797 ed.); 2 Hale, Pleas of the Crown 240-54 (Dougherty ed. 1800). Reprosecution after an acquittal was permitted, however, if the first indictment erroneously failed to charge an offense. In *Vaux's Case*, 4 Coke 44, 76 Eng. Rep. 992 (Q.B. 1591), it was held that if the first indictment was deficient for failure to charge all the elements of the felony and a second indictment was brought for the same offense, a plea of *autrefois acquit* would be bad even though the acquittal had not resulted from an objection to the indictment. A different rule applied in the case of an error of law committed by the court in the course of the trial. Even if the lower court's

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prosecution by the crown. See 1 Britton 104 (Nicholas trans. 1865); Thayer, A Preliminary Treatise on Evidence at the Common Law 158-59, 161 (1898).

By the fifteenth century, however, an acquittal on an appeal, at least after trial by jury, once again generally barred suit by the king, and an acquittal on an indictment could be pleaded as a bar to a subsequent appeal. Kirk, *"Jeopardy" During the Period of the Year Books*, 82 U. Pa. L. Rev. 602, 607 (1934); Friedland, Double Jeopardy 9 (1969).

error was egregious, such as a mistaken direction by the judge that the felony was not committed on the day named in the indictment, or an erroneous determination that the conduct alleged and proved did not constitute a felony, the defendant could plead *authefois acquit* to a second indictment.

Blackstone's careful classification of the various common law pleas in bar indicates that by the late eighteenth century, the status of the double jeopardy protection was well settled. The four pleas in bar, according to Blackstone, were *autrefoits acquit*, *autrefoits convict*, *autrefoits attaint* (former attaint, founded on the reasoning that "a second prosecution cannot be to any purpose, for the prisoner is dead in law by the first attainder"), and pardon. In terms that plainly anticipated the Fifth Amendment's language, Blackstone described it as a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 Blackstone, Commentaries of the Laws of England 335-36 (Sharswood ed. 1873). As in the time of Coke, the protection was afforded only if the defendant could legally have been convicted on the first indictment. 4 Blackstone, supra, 335 n.5 (Chitty).

In two critical respects, however, the law changed between the seventeenth and eighteenth centuries. In 1660, the King's Bench disapproved earlier cases that had permitted the crown to seek a new trial after an acquittal. *Rex* v. *Read*, 1 Lev. 9, 83 Eng. Rep. 271 (K.B. 1660). Although the ruling was made over the

dissent of a well-respected judge, the court stuck to its position with increasing confidence in later cases. See, *e.g.*, *Rex* v. *Jackson*, 1 Lev. 124, 83 Eng. Rep. 330 (K.B. 1661); *Rex* v. *Fenwick & Holt*, 1 Sid. 149, 153, 82 Eng. Rep. 1025, 1027 (1663). See also 21 Viner, A General Abridgement of Law and Equity 478-79 (1793).[6] By the time of Blackstone, it appears that although the king was theoretically permitted to bring a writ of error when the error appeared on the face of the record, Friedland, Double Jeopary 287 (1969), the prosecution could not be granted a new trial unless the defendant had obtained his acquittal by fraud or treachery. See 2 Hawkins, Pleas of the Crown, ch. 35 § 8; ch. 47 § 12; ch. 50 § 10 (6th ed. 1788); 1 Chitty, The Criminal Law 657,

[6] Sir Matthew Hale contributed to the confusion over whether the king could have a new trial after an acquittal, since in his influential treatise he assumed that it was possible. For gross errors of law in the trial court, Hale commented that the king could seek reversal by writ of error and then indict the defendant *de novo*. He urged that in such a case, the appellate court should not simply enter a conviction, but should grant the defendant a new trial, "for possibly he hath other matter for his defense." 2 Hale, Pleas of the Crown 247 (Dougherty ed. 1800).

By 1691, however, the court of King's Bench had apparently forgotten both Hale's prescription and its own earlier inconstancy, for in *Rex* v. *Davis*, 1 Shower 336, 89 Eng. Rep. 609 (K.B. 1691), the reporter wrote that "a new trial was denied, for that the Court said, there could be no precedent shown for it in case of acquittal." By 1776, defense counsel could assert confidently, "whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops." *Duchess of Kingston's Case*, 20 Howell, State Trials 355, 528 (1776).

747 (Am. ed. 1836); 4 Stephen, New Commentaries on the Laws of England 456 (1845 ed.). See also *United States* v. *Sanges*, 144 U.S. 310, 312 (1892).[7] During the same period, defendants gradually won broader rights to appeal from a conviction. Through the 1660's, the court of King's Bench refused to grant defendants the right to a new trial upon proof of error in the first, *Rex* v. *Lewin*, 2 Keble, 396, 84 Eng. Rep. 248 (K.B. 1663); *Rex* v. *Marchant*, 2 Keble 403, 84 Eng. Rep. 253 (K.B. 1663), but in the next decade the court reversed its stance and decided that a defendant could have a new trial in at least some circumstances. *Rex* v. *Latham & Collins*, 3 Keble 143, 84 Eng. Rep. 642 (K.B. 1673); *Rex* v. *Cornelius*, 3 Keble 525, 84 Eng. Rep. 858 (K.B. 1675). Nonetheless, there were still strict limitations on defendants' appeal rights. Even in the eighteenth century, in capital cases the defendant's writ of error could not be taken without the king's permission. See *Rex* v. *Wilkes*, 4 Burr. 2527, 2551, 98 Eng. Rep. 327, 340 (K.B. 1770); *The Ailsbury Case (Anonymous)*, 1 Salk, 264, 91 Eng. Rep. 232 (K.B. 1699). *Cf. United States* v. *Gilbert*, 25 F. Cas. 1287 (No. 15,204) (C.C.D. Mass. 1834 (Story, J.). Chitty noted that the court could grant a new trial after defendant brought a writ of error, "Not on the merits, but only for ir-

[7] Even the exception for fraud and treachery was somewhat doubtful. The text writers regularly recited the exception as the preferable rule, but Friedland reports that in only one case was the exception actually applied to overturn an acquittal. Friedland, Double Jeopardy 286 & n.4 (1969).

regularity in the proceedings." 1 Chitty, *supra*, at 654. In misdemeanor cases the writ of error was discretionary with the court, but by the end of the eighteenth century, as Stephen observed, a writ of error could be brought "for notorious mistakes in the judgment or other parts of the record." He added that if the defendant won a reversal, "he remains liable to another prosecution for the same offense; for the first being erroneous, he never was in jeopardy thereby." 4 Stephen, New Commentaries on the Laws of England 456-58 (1845 ed.).

Although the documentary history of the Double Jeopardy clause is scanty, the available evidence suggests that the draftsmen of the Bill of Rights intended to import into the Constitution the common law protections much as they were described by Blackstone. Madison's first version of the clause, which he introduced in the House of Representatives on June 8, 1789, read: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." 1 Annals of Congress 434 (1789).[8] In the course of the debate in the House over the proposed amendments, Representative Benson argued against Madison's language on the ground that its meaning appeared "rather doubtful." Benson presumed that the amendment "was intended

[8] This language, which rather clearly would have prevented a government appeal that would require a new trial, may have stemmed from Maryland's proposal that in criminal cases "there be no appeal from matter of fact, or second trial after acquittal." 2 B. Schwartz, The Bill of Rights: A Documentary History 732 (1971).

to convey what was formerly the law, that no man's life should be more than once put in jeopardy for the same offense." Yet it was well known, he insisted, that a defendant was entitled to more than one trial, upon reversal of his original conviction. Representative Sherman agreed, adding that the amendment as it stood might appear to prevent a defendant from suing out a writ of error in his own behalf. In defense of Madison's proposal, Representative Livermore stated that the clause was in fact declaratory of law as it stood, and suggested that making any changes would risk giving the impression that Congress intended to change the law by implication. 1 Annals of Congress 753 (Aug. 17, 1789).

The Senate rejected Madison's language in favor of the more traditional common law expression, employing the term "jeopardy," rather than specifying "more than one punishment or one trial."[9] Although the report of the Senate debates is unenlighteningly perfunctory, the Senate's choice of language that closely tracked the traditional characterization strongly suggests that the Senate intended to ensure that the

[9] The Senate's language may have derived largely from the proposed amendment offered by the New York Ratifying Convention, which read in part, "That no person ought to be put twice in jeopardy of Life or Limb for one and the same offence." 2 B. Schwartz, *supra*, at 912.

The language also closely tracked the common law formulation as it was understood at the time. In 1788, for example, a Pennsylvania court recited, "by the law it is declared that no man shall twice be put in jeopardy for the same offense." *Respublica* v. *Shaffer*, 1 Dall. 236, 237 (Phil. Oyer & Term. 1788).

Double Jeopardy clause incorporated the protections for defendants that the common law had come to provide—neither more nor less.[10] The history may leave it open to argue that the framers did not regard the crown's inability to appeal an acquittal after a trial on the merits as part of the common law concept of double jeopardy but rather as an independent principle, to be followed for a century but not incorporated in the clause, although the general flavor of the debate, especially the emphasis on the defendant's right to a retrial, is somewhat to the contrary. However, any uncertainty as to the disposition of this case is resolved, as far as we are concerned, by Supreme Court decisions, to which we now turn.

III.

In its first century, the Double Jeopardy clause posed relatively few difficulties for the Supreme

[10] The case law in the thirteen original states at the time the Bill of Rights was drafted gives some further insight into the dimensions of the common law protection the drafters thought they were building into the Fifth Amendment. The few reported cases touching on the problem of appeals in criminal cases generally stated or appeared to assume that the prosecution could not appeal from an acquittal, even though the defendant under the proper circumstances could appeal from his conviction. See *Hannaball* v. *Spalding*, 1 Root 86 (Conn. 1789); *Coit* v. *Geer*, v *Kirby* 269 (Conn. 1787); *Steel* v. *Roach*, 1 Bay's R. 61 (S.C. 1788). *Contra*, *State* v. *Hadock*, 2 Haywood 162 (N.C. 1802), overruled in *State* v. *Jones*, 1 Murphy 257 (N.C. 1809). Later cases demonstrate that during the nineteenth century, the rule became practically universal that the state could not appeal from an acquittal. See *United States* v. *Sanges*, 144 U.S. 310 (1892).

Court. The problems that did arise, such as reprosecution after a mistrial, *United States* v. *Perez*, 9 Wheat. (22 U.S.) 579 (1824), multiple punishment on a single verdict, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and consecutive prosecutions by different sovereigns for the same conduct, *Moore* v. *Illinois*, 55 U.S. (14 How.) 13 (1852), were familiar to the English courts, and in applying the clause the Supreme Court relied heavily on the common law analysis.

The problem of government appeals did not reach the Supreme Court until *United States* v. *Sanges*, 144 U.S. 310 (1892). In that case, the Court carefully reviewed the common law authorities in England and in many states and concluded that in the absence of an express enabling statute, the Government could not bring an appeal in a criminal case from any adverse determination below, whether the decision in the trial court was based on a question of fact or of law. Although some of the state cases went on grounds of double jeopardy, the Court neither adopted nor rejected this ground of decision. Rather it left open whether and under what circumstances a federal statute authorizing appeal by the Government from an acquittal would pass constitutional muster.

Kepner v. *United States*, 195 U.S. 100 (1905), squarely presented the question whether a provision against double jeopardy, there embodied in an act for the government of the Philippines, 32 Stat. 691, 692 (1902), prevented an appeal by the Government after an acquittal at trial. Kepner, a Philippine at-

torney, had been acquitted of the charge of embezzlement after trial to the court. The Government appealed to the Supreme Court of the Philippines, pursuant to local custom; that court reversed the acquittal, found Kepner guilty, and sentenced him. A sharply divided Supreme Court reversed the conviction and held that an acquittal in the trial court absolutely barred government review by appeal, and that under the Double Jeopardy clause this would be true in the United States even if a statute purported to grant the Governmental appeal rights. Mr. Justice Day, writing for five Justices, quoted at length from *United States* v. *Ball*, 163 U.S. 662 (1896), where the Court, refusing to follow *Vaux's Case*, *supra*, had held that the Government could not bring *a new prosecution* after the defendant had been acquitted of the same offense under a defective indictment which he had not challenged. Although the problem of appeal is obviously distinct from that of a second prosecution, the Court relied, 195 U.S. at 129-30, on a dictum from *Ball* saying, 163 U.S. at 671 "The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution." Mr. Justice Holmes, joined by two other Justices,[11] filed a vigorous dis-

[11] The ninth Justice, also dissenting, apparently would have agreed with the majority if the case had arisen in a federal court within the United States but believed that the Act of Congress was not intended to change the previous Philippine practice whereby "the jeopardy did not terminate, if appeal were taken to the audiencia or Supreme Court, until that body had acted upon the case." 195 U.S. at 137.

sent. Relying heavily on the defendant's right to secure a new trial on appeal from a conviction, he argued that "logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause." 195 U.S. at 134.

Two years later, as a result of unrelated developments, Congress passed the first Criminal Appeals Act, 34 Stat. 1246 (1907). The new statute allowed the United States to appeal from a district or circuit court to the Supreme Court in three categories of cases:

> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.
>
> From the decision or judgment sustaining a special plea at bar, when the defendant has not been put in jeopardy.

The first category clearly presented no constitutional problem since it dealt with cases where a defendant

had not yet been put in jeopardy,[12] as Mr. Justice Holmes was quick to point out in *United States* v. *McDonald*, 207 U.S. 120, 127 (1907). The third category also created no difficulty since it was expressly limited to cases where "the defendant has not been put in jeopardy," see *United States* v. *Sisson*, *supra*, 399 U.S. at 304-07. The second category did not offend the principle that a defendant acquitted by the trier of fact could not be prosecuted again; it related only to a case where the defendant had been convicted and the judge later ruled he should not have been tried at all. The same analysis applies to the Act of May 9, 1942, 56 Stat. 271, authorizing an appeal to the courts of appeals from a decision or judgment "quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof," or from a decision arresting a judgment of conviction, except, in either case, where a direct appeal could be taken to the Supreme Court. Although the 1948 amendment, 62 Stat. 844, altered the wording somewhat, the courts avoided any potential difficulties by construing

[12] The general rule is that jeopardy attaches when the jury is selected and sworn or, in a bench trial, when the judge begins to hear evidence. *Wade* v. *Hunter*, 336 U.S. 684, 688 (1949); *Green* v. *United States*, 355 U.S. 184, 188 (1957); *United States* v. *Jorn*, 400 U.S. 470, 479 (1971); *McCarthy* v. *Zerbst*, 85 F.2d 640, 642 (10 Cir.), *cert. denied*, 299 U.S. 610 (1936). The conclusion that jeopardy attaches when the trial commences, Justice Harlan pointed out in *United States* v. *John*, *supra*, "expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings." 400 U.S. at 480.

the Act, not according to what the revisers had written, but according to the interpretation that had been given the prior statutory language. See *United States* v. *DiStefano*, 464 F.2d 845, 847-48 (2 Cir. 1972); *United States* v. *Apex Distributing Co.*, 270 F.2d 747 (9 Cir. 1958). Since the United States could not appeal at all prior to the Criminal Appeals Act of 1907 and since that statute did not permit appeals after acquittals on the merits, the dearth of federal authority on the problem before us is not surprising.[13]

[13] The states have adopted a wide variety of schemes concerning appeals by the prosecution, a few permitting appeal from an acquittal, some permitting appeal in certain classes of cases or from certain trial court orders, and some permitting no appeal whatsoever. See Miller, *Appeals by the State in Criminal Cases*, 36 Yale L.J. 486 (1927); Mayers & Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960). Connecticut, Vermont and Wisconsin have all enacted statutes permitting the state to appeal from acquittals, Conn. Gen. Stat. Ann. § 54-96 (Supp. 1973); Vt. Stat. Ann. tit. 13 § 7403 (1958); Wis. Stat. Ann. § 974.05(1)(e) (1971), repealed, 1971 Laws, ch. 298 § 25. In each case, however, the state's appeal has been strictly limited to errors of law and further cabined by rigid procedural restrictions. As a result, the state has made sparing use of its appeal rights in these three jurisdictions, and the courts have experienced little difficulty in distinguishing findings of fact, which are immune from review, and determinations of law, which can be appealed. See, *e.g.*, *State* v. *Dennis*, 150 Conn. 245, 188 A.2d 65 (1963) (erroneous instruction); *State* v. *Ballou*, 127 Vt. 1, 238 A.2d 658 (1968) (erroneous direction of acquittal); *State* v. *Stang Tank Lines*, 264 Wis. 570, 59 N.W.2d 800 (1953) (suspension of fine held outside trial court's discretion).

Although the Wisconsin constitution contains a double jeopardy clause, the state supreme court upheld the government appeal statute, expressly relying on Justice Holmes' rea-

The first Supreme Court decision after *Kepner* that is of real relevance is *Fong Foo* v. *United States*, 389 U.S. 141 (1962). In what promised to be a long criminal trial, three government witnesses had testified and a fourth was in the process of doing so when the district judge directed the jury to return verdicts of acquittal,[14] and then entered a formal judgment of acquittal as to all defendants. The judge acted because of what he considered a lack of credibility in the government's initial witnesses and improper conduct by the prosecutor. Considering the trial court's action to have been a usurpation of judicial power, the court of appeals issued mandamus requiring that the judgment of acquittal be vacated. It held that since the judge lacked power to direct the acquittal, the judgment was void and would not support a plea of *autrefois acquit*.[15] The Supreme Court reversed in a brief *per curiam* opinion, relying on the same dictum

soning in his dissent in *Kepner*. *State* v. *Witte*, 243 Wis. 423, 431, 10 N.W.2d 117, 120 (1943). The Wisconsin provision was repealed two years ago in recognition of the Supreme Court's decision in *Benton* v. *Maryland*, 395 U.S. 784 (1969), which held the Double Jeopardy clause binding on the states.

[14] The judge announced to the defendants, "You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free." *In re United States*, 286 F.2d 556, 560 (1 Cir. 1961).

[15] Judge Aldrich concurred on the basis that he was certain that the judge had acted solely because of an erroneous view of improper prosecutorial conduct; if the judge had directed acquittal because of his belief, however erroneous, in the lack of credibility of the government witnesses, Judge Aldrich wrote, he would not have been guilty of a usurpation of power, 286 F.2d at 565.

from *Ball* that had formed the basis of *Kepner*. The Court said, 369 U.S. 141, 143 (1962):

> The petitioners were tried under a valid indictment in a federal court which had jurisdiction over them and over the subject matter. The trial did not terminate prior to the entry of judgment . . . . It terminated with the entry of a final judgment of acquittal as to each petitioner. The Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation. Nevertheless, "[t]he verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the Constitution."

The only later Supreme Court decision directly relevant to our problem is *United States* v. *Sisson*, 399 U.S. 267 (1970). Sisson, like Jenkins, had been charged in a standard indictment with violating 50 U.S.C. App. § 464(a) by failing to obey an order to submit to induction. After the judge had denied various motions to dismiss the indictment, the case went to a rather confused trial. Although Sisson offered some testimony that might be deemed relevant to a claim of conscientious objection, 399 U.S. at 274-75, the case was submitted to the jury on the issue whether Sisson's refusal to submit to induction was wilful. The jury brought in a guilty verdict. The defendant thereupon moved to arrest the judgment, F.R.Cr.P. 34, on the ground that because of the alleged illegality of the Vietnam war, the court lacked jurisdiction. Not passing on this claim, the court pur-

ported to "arrest judgment" on the ground that Sisson had satisfied the court that he had genuine moral objections to combat service in Vietnam and that to compel him to render such service would violate the Free Exercise provision of the First Amendment and the Due Process Clause of the Fifth. The court ruled also that § 6(j) of the Selective Service Act, 50 U.S.C. App. § 456(j), violated the Establishment Clause.[16] In an opinion by Mr. Justice Harlan, the Supreme Court dismissed the Government's appeal for want of jurisdiction.

Much of Justice Harlan's opinion was devoted to demonstrating that, despite its language, the district court's order was not in fact one "arresting a judgment of conviction for insufficiency of the indictment or information where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded," the language of § 3731 at that time. This conclusion rested on two bases: (1) "that a judgment can be arrested only on the basis of error appearing on the 'face of the record,' and not on the basis of proof offered at trial," 399 U.S. at 281; and (2) that the court's adverse decision was not for insufficiency of the indictment, 399 U.S. at 287-88. If the opinion had stopped there, it would have little bearing on the instant case. But it did not, and for an important reason—the portion of the opinion up to that point had the assent of only four members of the Court.

[16] The district court's views were later held to be erroneous, *Gillette* v. *United States*, 401 U.S. 437 (1971).

There followed slightly over two pages in which alone Justice Harlan wrote for a majority, 399 U.S. at 288-90. These began by saying:

> The same reason underlying our conclusion that this was not a decision arresting judgment —i.e., that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty.

The Justice then propounded a hypothetical case similar to *Sisson* except that the trial judge instructed the jury to acquit if they made the same factual findings that the court in *Sisson* had reached in its post-trial opinion. If the jury had then acquitted, Justice Harlan wrote, there could be "no doubt that its verdict of acquittal could not be appealed under § 3731 *no matter how erroneous the constitutional theory underlying the instructions*," 399 U.S. at 289 (emphasis in original). This was followed by a quotation from the remarks of Senator Knox concerning the bill that was to become the Criminal Appeals Act, 41 Cong. Rec. 2752, saying, *inter alia:*

> The Government takes the risks of all the mistakes of its prosecuting officers *and of the trial judge in the trial*, and it is only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial. (Emphasis in original).

It would still be arguable that all this was directed to the issue of construction of the Criminal Appeals Act. But the Justice then said:

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution. . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense," United States v. Ball, 163 U.S. 662, 671 (1896).

In a footnote to that passage, Justice Harlan added: "This principle would dictate that after this jurisdictional dismissal, Sisson may not be retried." *Id.* at 289-90 & n. 18. The passage quoted from *Ball* was the very one that Mr. Justice Day had cited in *Kepner* for the proposition that the Double Jeopardy clause prohibited an appeal by the Government after acquittal in a criminal case and that the Court had again relied on in *Fong Foo*.

The Justice then disposed of three differences between his hypothetical and the *Sisson* case. Two of these are relevant here. It made no difference that "in this case it was the judge—not the jury—who made the factual determinations," since "judges, like juries, can acquit defendants," 399 U.S. at 290. It was likewise inconsequential that the judge had labeled his characterization an arrest of judgment rather than a post-verdict acquittal; what was important was what the judge did, not what he said.

These pages of the *Sisson* opinion seem to us to be dispositive of the instant case. In essence the judge's post-trial ruling in *Sisson* had made the jury trial a nullity and had resulted in a trial to the judge, who had rendered a judgment of acquittal on the merits. Even though this action was based on an erroneous legal ground, the Double Jeopardy clause prevented a new trial.[17] Indeed, we have already interpreted *Fong Foo* and *Sisson* to mean precisely this. *United States* v. *Weinstein*, 452 F.2d 704, 709 (2 Cir. 1971), *cert. denied*, 406 U.S. 917 (1972).[18]

Although the district judge here characterized his action as a dismissal, it is clear from the analysis in *Sisson* that for double jeopardy purposes he acquitted

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[17] We see nothing in Justice Harlan's treatment of *United States* v. *Covington*, 395 U.S. 57 (1969), in footnotes 19 and 56 of his opinion, to alter this conclusion. The decisive distinction was that in *Covington* the district court had dismissed an indictment *before trial* for insufficiency, without an evidentiary hearing or any need for one. The same was true in *United States* v. *Boston & Maine R.R.*, 380 U.S. 157 (1965), upon which the dissent relies. See also *United States* v. *Pecora*, No. 72-2173 (3 Cir. Aug. 31, 1973), slip op. at 7; *United States* v. *Martin Linen Supply*, No. 72-2796 (5 Cir. Oct. 9, 1973), slip op. at 9.

[18] We are unable to understand what comfort the Government derives from that decision, where we vacated an order dismissing an indictment subsequent to a judgment of conviction as beyond the judge's power. Distinguishing *Fong Foo*, we said, 452 F.2d at 711 n.10:

> There is no similar problem here. Vacating the order dismissing the indictment would simply leave the judgment of conviction unimpaired, subject to whatever remedies Grunberger may have with respect to it.

Jenkins has been *acquitted*, even if erroneously so.

the defendant. His ruling was based on facts developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case. The dissent here contends that the district court's findings of fact were largely undisputed and not relevant to the pivotal legal issue in question. However, the discussion section of the district court's opinion makes it clear that it was relying on the precise circumstances of Jenkins' case to conclude that the Supreme Court's decision in *Ehlert* should not be applied retroactively to him. The district court was not construing the statute, which had been authoritatively interpreted in *Ehlert*, and holding that Jenkins did not come within it as a matter of law. It was holding that the statute should not be applied to him as a matter of fact.

Other courts of appeals have followed a similar course of inquiry in determining whether a trial court's ruling should be deemed an acquittal. In *United States* v. *McFadden*, 462 F.2d 484 (9 Cir. 1972), the court considered a limited conscientious objection claim very similar to the one at issue in *Sisson*. Finding that the trial court had dismissed the indictment on the basis of evidence introduced at the trial, the Ninth Circuit held that the court had acquitted the defendant, and that he could not be retried. By contrast, the Seventh Circuit recently rejected a claim that an arrest of judgment constituted an acquittal. *United States* v. *Esposito*, No. 71 CR 980 (7 Cir. June 12, 1973), *petition for cert. filed*, 42 U.S.L.W. 3137 (Sept. 6, 1973). The trial court in *Esposito*

had held that the offense of illegal possession and distribution of cocaine was "not one which Congress has power to prohibit in the manner attempted by 21 U.S.C. § 841." On appeal, the court held that the trial judge's decision had not been based on facts adduced at trial, but solely on his opinion that the statute was unconstitutional. The court wrote, slip opinion page 4, that

> it is clear from the order that the court concluded that the fatal defect in the prosecution lay in the indictment's failure to state and the statute's failure to require a nexus with interstate commerce which would justify federal regulation. The fact that the prosecution failed to prove such a connection though alluded to in the order, was of no significance to the actual basis for the decision.[19]

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[19] We have no occasion to consider the correctness of decisions that have extended this analysis to pre-trial rulings. In *United States* v. *Ponto*, 454 F.2d 657 (7 Cir. 1971) (*en banc*), a sharply divided court held that the Government could not appeal from a pre-trial dismissal granted because the judge felt that the circumstances of the case required that the defendant's selective service classification should have been reopened. See also *United States* v. *McCreery*, 473 F.2d 1381 (7 Cir. 1973); *United States* v. *Southern Ry.*, No. 72-1794 (4 Cir. Oct. 15, 1973). Similarly, in *United States* v. *Rothfelder*, 474 F.2d 606 (6 Cir.), *cert. denied*, 41 U.S.L.W. 3673 (U.S. June 25, 1973), the court held that the Government could not appeal from a pre-trial order dismissing an indictment when the trial court had made its ruling on the basis of information in the defendant's selective service file rather than simply on the basis of the sufficiency of the indictment. See also *United States* v. *Hill*, 473 F.2d 759, 761 (9 Cir. 1972) (court's pre-trial determination that materials were

The Government argues that a reversal here would not require Jenkins to undergo the burden of a second trial, since the judge would simply be directed to alter his erroneous conclusions of law with respect to the non-retroactivity of *Ehlert* v. *United States*, 402 U.S. 99 (1971), in light of our decision in *United States* v. *Mercado*, 478 F.2d 1108 (2 Cir. 1973), and Jenkins' only vexation would lie in being convicted rather than acquitted. We are not certain the matter is quite that simple since in *Mercado* we recognized the possibility of a successful defense by "a registrant who in fact reasonably relied in good faith on the case law or upon the knowledge that local boards in this circuit would consider a belated conscientious objection claim," 478 F.2d at 1111. But apart from that, the absence of need for a second trial would not distinguish *Sisson*. As Mr. Justice White pointed out in dissent, a reversal there on the basis that the trial judge's legal theory was incorrect would simply have meant that "the jury's verdict of guilty—with judgment no longer 'arrested'—simply remains in effect." 399 U.S. at 329. Furthermore, although what we must decide is the case before us, the Government has sought a ruling limited to bench trials where an acquittal plea can be traced to a demonstrable error of law and no further evidentiary hearing is needed. It asserts that the amended Criminal Appeals Act entitles it to appeal every acquittal which can be demonstrated to be the result

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not obscene amounts to a ruling that the defendants were not guilty and thus barred appeal).

of an error of law by the judge. Boldly facing up to its problems, the Government contends that the Double Jeopardy clause should be read to permit a retrial even on an erroneous instruction, a position Justice Harlan rejected out-of-hand in *Sisson*, 399 U.S. at 289. We think that, so long as *Kepner* and *Sisson* stand, the clause forbids a retrial whenever the trier of the facts has rendered a legal determination of innocence "on the basis of facts adduced at the trial relating to the general issue of the case." 399 U.S. at 290 n.19.

The short of the matter is this: *Kepner* held that an acquittal on the general issue barred an appellate court from entering a judgment of conviction on appeal. Since under Philippine practice no further proceedings were required below, the decision belies any view that the Double Jeopardy clause protects only against the vexation of a second trial. *Fong Foo* held that a directed acquittal barred a retrial even when it was plain that the acquittal was occasioned by clear error of the judge. *Sisson* held that when a guilty verdict had been nullified by a judge's decision to acquit on the merits, the Double Jeopardy clause prevented an appellate court from directing the entry of a judgment of conviction. We cannot see how in the circumstances here presented the Government can thread a way through this thicket so long as these decisions stand.[20]

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[20] Reexamination of the dictum in *Ball* that underlay *Kepner*, *Fong Foo* and *Sisson* may well be desirable, particularly now that the Double Jeopardy clause has been extended to the

We add a final word to make clear what we have *not* decided. We are not dealing with appeals by the Government before jeopardy has attached, see fn. 12, as in *United States* v. *Crutch*, 461 F.2d 1200 (2 Cir.), *cert. denied*, 409 U.S. 883 (1972); *United States* v. *Castellanos*, 478 F.2d 749 (2d Cir. 1973); and *United States* v. *Goldstein*, 479 F.2d 1061 (2 Cir. 1973). We likewise are not dealing with cases where a trial is aborted after jeopardy has attached but before a conclusion of innocence or guilt, of which *Illinois* v. *Somerville*, 410 U.S. 458 (1973), is the latest in a long line of Supreme Court decisions reaching back to *United States* v. *Perez*, 9 Wheat. (22 U.S.) 519 (1824). Finally, we are not dealing with a case, such as that cited in the Senate Report, *supra*, at 12, where the defense postponed until after the swearing of a jury a motion to dismiss an indictment which could as well have been made before, or with the problem presented by the decisions cited in footnote 19. We hold that when a defendant has been

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states. *Benton* v. *Maryland*, 395 U.S. 784 (1969). Mr. Justice Cardozo, writing for an 8-man majority in *Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937), remarked "how much was to be said" for the *Kepner* dissent. See also Mayers and Yarbrough, Bis Vexari: *New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 8-15 (1960); Miller, *Appeals by the State in Criminal Cases*, 36 Yale L.J. 486 (1927). Any such reexamination would also have to take account of the principle of implied acquittal developed in *Green* v. *United States*, 355 U.S. 184 (1957), and *United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (2 Cir. 1965) (Marshall, *J.*), *cert. denied*, 383 U.S. 913 (1966). But this is far beyond our power as an inferior court.

acquitted after trial on the merits, the Government cannot appeal from the judgment, even for an allegedly demonstrable error of law by the judge, so long as the Supreme Court adheres to the dictum in *Ball* and the decisions in *Kepner* and *Sisson*.

The appeal is dismissed for lack of jurisdiction on the ground that the Double Jeopardy clause prohibits further prosecution.

LUMBARD, *Circuit Judge* (dissenting):

After a trial before Judge Travia without a jury in the Eastern District of New York, the indictment charging Ronald Jenkins with violating 50 U.S.C. App. § 462(a) for failure to comply with an order to submit to induction into the armed forces was dismissed. In dismissing the indictment and discharging the defendant, Judge Travia concluded that the law had not been violated since Jenkins was not required to report for induction while his post-induction notice request for reclassification as a conscientious objector was still pending. On appeal, the government argued that Judge Travia's interpretation of the controlling law was clearly erroneous. Without actually deciding this issue, the majority of this panel now holds that the government has no right to appeal, since to permit it to do so would be to put the defendant in double jeopardy.

For two reasons, I am unable to join the majority in concluding that the government's appeal is barred in the present case by the Double Jeopardy Clause.

First, I believe that Judge Travia's decision was precisely what he termed it, a dismissal of the indictment, an order from which a government appeal is not barred, when, as here, the dismissal is based on a construction of the statute upon which the indictment is founded. 18 U.S.C. § 3731.[1] Second, it is my firm belief that the majority's inflexible application of the Double Jeopardy Clause unnecessarily frustrates the fair administration of criminal justice.

With regard to the first of these points, it is, of course, true, that Judge Travia's characterization of his decision as a dismissal of an indictment does not conclusively make it that for purposes of determining the government's right to appeal.[2] If his decision

[1] 18 U.S.C. § 3731 provides that:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The present version of § 3731, except for eliminating the government's right to appeal directly to the Supreme Court from the decision of a district court, in all other respects leaves intact the right to appeal which the government had under the former version of the statute. *See* p. 700 *supra*. Under that former version the government could appeal from a decision dismissing an indictment "where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

[2] As *United States* v. *Sisson*, 399 U.S. 267, 280 (1970), makes clear, the appellate court must look behind the label used by the trial judge to determine the true nature of his decision.

should more accurately have been described as an acquittal, then the Double Jeopardy Clause would prohibit this appeal. On the other hand, if Judge Travia's characterization is proper, then there is no obstacle to further government prosecution of this case.[3]

In determining the underlying identity of the trial judge's decision, we should first consider *United States* v. *Sisson*, 399 U.S. 267 (1970). That case also involved a refusal to submit to induction on the basis of a claim for conscientious objector status. After a trial and a jury verdict of guilty, District Judge Wyzanski stated that the indictment against Sisson failed to "charge an offense." Based on the evidence adduced at trial, and in particular, the demeanor of the defendant, the judge concluded that Sisson was a "sincerely conscientious man" and that because of his genuine interest in not killing, the Free Exercise and Due Process Clauses prohibited application of the 1967 draft act to him. Accordingly, he granted the defendant's motion for an arrest of judgment.

Appealing directly to the Supreme Court,[4] the government claimed that the Court had jurisdiction un-

[3] The rationale for this distinction in treatment of acquittals and dismissals of indictments arises from the fact that a dismissal based upon the invalidity or construction of the statute on which the indictment was founded was not considered to have placed the defendant in jeopardy, since it was not a determination on the merits of the case. M. Friedland, Double Jeopardy 63 & 63 n.1 (1969).

[4] Former 18 U.S.C. § 3731, under which the appeal in *Sisson* was brought, permitted a direct appeal to the Supreme Court

der the "arresting judgment" provision of the Criminal Appeals Act, 18 U.S.C. § 3731. The Supreme Court, however, refused to hear the appeal, maintaining that the district judge's decision, although designated by him an "arrest of judgment," was, in fact, an acquittal, which was unappealable by the government under § 3731. In addition the Court reasoned that being an acquittal, the appeal by the government was further barred by the Double Jeopardy Clause.

In concluding that Judge Wyzanski's decision had not been an arrest of judgment, but rather an acquittal, the Court emphasized that the disposition of the case had been "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial," especially the demeanor of the defendant. The Court made clear, however, that had the district judge granted the motion instead "on the face of the record," that is, on the basis that the indictment failed to charge any violation of the law, the ruling could have been regarded as an arrest of judgment and the government

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by the government from a decision arresting a judgment of conviction as well as one dismissing an indictment, "where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded." The present version of § 3731, under which the government seeks to appeal in *Jenkins* no longer permits direct appeal to the Supreme Court from the district court's decision. However, as has been noted, in all other respects it leaves intact the government right to appeal. *See* p. 700 *supra*.

would have been permitted to appeal. *See, e.g., United States* v. *Bramblett*, 348 U.S. 503 (1955).

Just as a genuine arrest of judgment would have permitted a government appeal in *Sisson*, under § 3731, so, too, that statute would have allowed an appeal from a genuine dismissal of an indictment. But as *Sisson* makes clear, before an appellate court may exercise jurisdiction, it must inquire into the real nature of the trial judge's action to make certain that it is not an acquittal barring appeal. Thus the crucial consideration in this inquiry is whether the judge's decision was on the merits, that is, did it hinge on the facts adduced at trial or rather was it made independently "on the face of the record." In *Sisson*, Judge Wyzanski clearly relied upon the evidence at trial, and, in particular, on the demeanor of the defendant. In granting an arrest of judgment, he first made a finding on the factual issue of Sisson's sincerity as a conscientious objector.

Judge Travia's dismissal of the indictment against Jenkins, on the other hand, was essentially a legal determination construing the statute on which the indictment was based. 50 U.S.C. App. § 462(a).[5] In

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[5] Specifically, Judge Travia was of the view that 50 U.S.C. App. § 462(a), making it a crime to fail to comply with an induction order, was qualified by 32 C.F.R. § 1625.2, which provided that

> The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the cur-

contrast to Judge Wyzanski, Judge Travia was not required to resolve any factual issues in order to reach his decision. It is true that the judge did make nine findings of fact. But of these, six had no bearing whatever on the pivotal legal issue, whether or not the pertinent statute required an individual to report for induction if his post-induction notice re-

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rent deferment of the registrant in a case involving occupational deferment, if such request is accompanied by information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

In Judge Travia's view, this provision relieved an individual who had received his notice from reporting for induction so long as his request for reclassification was pending. This view was in conflict with the law in the Second Circuit at the time, *United States* v. *Mercado*, 478 F.2d 1108 (1973), the weight of authority in the other circuits, *e.g. Ehlert* v. *United States*, 422 F.2d 332 (9th Cir. 1970), *Davis* v. *United States*, 374 F.2d 1 (5th Cir. 1967), *United States* v. *Al-Majied Muhammed*, 364 F.2d 223 (4th Cir. 1966), *United States* v. *Taylor*, 351 F.2d 228 (6th Cir. 1965), and the position adopted by the Supreme Court after the date Jenkins was to report for induction, but before Judge Travia's decision. *United States* v. *Ehlert*, 402 U.S. 99 (1971).

quest for conscientious objector status was still pending. Indeed, these six findings were undisputed. In any event, as the *Sisson* Court noted in discussing *United States* v. *Halseth*, 342 U.S. 277 (1952), even where the parties go so far as to stipulate facts not contained in the indictment for purposes of a motion to dismiss, an appeal will lie so long as "the facts in the stipulation were irrelevant to the legal issue." 399 U.S. at 285.

The other three findings of fact simply established that the defendant requested and returned the appropriate form for claiming consicentious objector status. While these findings bear some relation to the trial judge's ultimate conclusion of law—that Jenkins need not have reported for induction during the pendency of his request for reclassification—they hardly represent the sort of foundation for the decision that the findings in *Sisson* did. At no time, for example, was the court called upon to resolve a factual issue regarding whether the application for reclassification by Jenkins had actually been filed. To be sure, the government at the time of the return of the indictment was fully aware of this request for reclassification, having had access to his selective service file. The government could easily have made mention of that claim for conscientious objector status in the indictment. Had that been done, there would be no doubt but that Judge Travia's decision would have been "on the face of the record" and thus a genuine dismissal of the indictment rather than an acquittal on the merits.

We do serious harm to the fair administration of criminal justice when we belabor technical requirements to the point where inclusion or omission of three innocuous, uncontested statements in the indictment ultimately determine whether the government may appeal from the trial judge's decision in a criminal case. We would also be penalizing the government for following a well-established and until now unquestioned rule that indictments need not state the entire factual background of a case, but may simply track the language of the statute allegedly violated and, in addition, do little more than state time and place in approximate terms. *See* F.R.Cr.P. 7(c); *United States* v. *Fortunato*, 402 F.2d 79, 82 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969).

The Supreme Court's decision in *United States* v. *Boston & Maine R.R. Co.*, 380 U.S. 157 (1965), offers substantial support for these views. That case involved an appeal by the government from a dismissal of one count of an indictment charging a violation of § 10 of the Clayton Act, which prohibits any commercial dealings by a common carrier in an amount greater than $50,000 with another enterprise in which officers of the carrier have "any substantial interest." Count I of the indictment had charged that the Boston & Maine R.R. and three of its officers had violated § 10 by arranging a sale of railroad equipment valued in excess of $50,000 to the International Railway Equipment Corp., in which the officers had a "substantial interest."

The trial judge recognized that the indictment itself was sufficient to withstand the defendants' motion to dismiss. But based on information presented in the bill of particulars, he granted the motion. The bill of particulars had described the "substantial interest" cited in the indictment as consisting of an agreement among the defendants to use their efforts to produce profits for International Railway and that they would then get a share of these profits. On the basis of this description, the court found no violation of § 10 since "substantial interest" within the meaning of the statute was "limited to one who has a then present legal interest in the buying corporation . . ." The government appealed directly to the Supreme Court under § 3731 and the Court, without expressing any reservations as to its jurisdiction, reviewed the case, ultimately vacating the trial judge's decision and remanding for further consideration.

Just as in *Boston & Maine R.R.* the indictment here charged a criminal offense; yet, on the basis of certain undisputed facts not contained in the indictment, the trial judge construed the underlying statute as not applicable to the particular case. In light of this substantial similarity between the cases, *Boston & Maine R.R.* offers strong support for permitting an appeal in the present case.[6]

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[6] It is, of course, true that in *Boston & Maine R.R.* the appeal was brought under the former version of § 3731, while the appeal in the present case has been raised under the amended § 3731. Nevertheless, as the majority opinion correctly suggests, the amendments to § 3731 were in no way intended to

But entirely apart from the question whether Judge Travia's decision was a dismissal of an indictment or an acquittal, I believe there is still another reason for permitting the government to appeal in this case. Simply stated, it is my view that the Double Jeopardy Clause is not an abstract rule, but one that should be adapted and applied in light of the totality of circumstances of each particular case. As Judge Friendly's thoroughgoing history of the Clause reveals, its evolution has been clouded with contradictions, inconsistencies, and uncertainties. It would be a serious mistake slavishly to adhere to a rigid application of this fifth amendment protection. An unalterable rule that the Double Jeopardy Clause bars all government appeals from acquittals, fails to weigh against the individual's very proper interest in not experiencing the anxiety, expense, and harassment that a second trial brings, the equally considerable interest of society in the fair, just, and sensible administration of criminal justice.[7] Only last term, the Supreme Court in *Illinois* v. *Somerville*, 410 U.S. 458 (1973), rejected the notion that technical errors

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restrict the government's right to appeal. Thus, if an appeal could have been brought under the prior § 3731, it may be brought under the amended version of the statute. *See* p. 700 *supra*.

[7] For quite some time, legal commentators have urged a more flexible analysis in determining whether the Double Jeopardy Clause is applicable to the circumstances of a particular case. *See generally* Mayers & Yarbrough, *Bix Vexari:* New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1 (1960); Note, Twice in Jeopardy, 75 Yale L.J. 262 (1965).

resulting in a mistrial should bar reprosecution. In such cases, the "ends of public justice" demand that "the purpose of law, to protect society from those guilty of crimes [not] be frustrated by denying courts power to put the defendant to trial again." 410 U.S. at 470.

I believe that the "ends of public justice" will not be served if we permit a defendant who is clearly guilty to go free because of the trial judge's erroneous interpretation of the controlling law. That Jenkins is guilty would appear to be indisputable in light of our decision in *United States* v. *Mercado*, 478 F.2d 1108 (1973), in which we held without reservation that even prior to *United States* v. *Ehlert*,[8] the law of this circuit was that an individual had to report for induction although his post-induction notice claim for conscientious objector status was still pending.

Accordingly, I would vacate the order of the court below and remand for a proper application of the law.

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[8] 402 U.S. 99 (1971). In *Ehlert*, the Supreme Court held that an individual must comply with an induction notice even though his post-induction notice request for reclassification as a conscientious objector has not yet been decided. The individual, whose beliefs had crystallized between notice and induction, would be entitled to a prompt in-service determination of his claim.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 71-CR-1315

UNITED STATES OF AMERICA

-against-

RONALD S. JENKINS

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

October 24, 1972

APPEARANCES:

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TRAVIA, D. J.

This action having come on to be heard before this court on the 3rd day of October, 1972, and the defendant having, by duly executed stipulation approved by this court, waived a trial by jury, [Court Exh. #1], and the evidence of the parties having been adduced, and the attorneys for the parties having submitted their pretrial and post trial memoranda and upon all the papers on file in this action, and after due deliberation this court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The defendant, RONALD S. JENKINS, is charged in a one count indictment with violation of 50 U.S.C. App. § 462(a), for failure to comply with an induction order to report and submit to induction into the Armed Forces.

2. Defendant registered with Local Board No. 50, Brooklyn, New York, on September 23, 1966.

3. On October 19, 1966, the defendant was placed in Class 2-S by the Local Board and such classification remained on an annual basis until November 18, 1970, when he was placed in Class 1-A by the said Local Board No. 50.

4. On January 20, 1971, the defendant was given a pre-induction physical at the Armed Forces Examination and Entrance Station, and was found to be medically qualified for induction.

5. On February 4, 1971, the Local Board mailed to defendant an SSS Form 252, an Order to Report for Induction on February 24, 1971.

6. On February 17, 1971, after receiving his induction notice, the defendant wrote to the Local Board

and requested SSS Form 150 for a conscientious objector classification.

7. On February 23, 1971, the defendant went in person to the Local Board and requested Form 150. He was advised to write a short statement as to his beliefs, which he did, and he was told to report for induction on the next day because his request for a postponement of his induction had been denied.

8. The defendant did not report for induction on February 24, 1971.

9. The defendant's SSS Form 150 was received by the Local Board on March 30, 1971.

Discussion

The essence of the defendant's defense is that at the time of his alleged commission of the crime, viz., his refusal to submit to induction, the law of the Second Circuit was such that he was entitled to a postponement of his induction to enable the Board to pass on the merits of his claim for C.O. status. Defendant contends that the failure of the Board to grant such a postponement and hearing was clearly a "lawless" act under the circumstances.[1]

[1] 32 C.F.R. § 1625.2 reads in pertinent part:

"The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant . . . provided, . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

In the case at bar, the defendant went to the Local Board and requested a Form 150 on February 23, 1971. At that time, he was asked to write a short note which not only requested the Form 150, but which also set out the basis for his claim. This court is of the opinion that this written note fulfilled the requirement of 32 C.F.R. § 1625.2, so that the "Board may reopen the classification."

At the time the defendant JENKINS was to be inducted into the Armed Forces, the opinion in the case of *United States* v. *Geary*[2] had construed the meaning of § 1625.2 for the court. The defendant in that case had similarly requested conscientious objector status after he had received his order to report for induction. He was convicted in the Federal District Court after refusing to take the symbolic step forward, but the United States Court of Appeals, Second Circuit, vacated the judgment of conviction and remanded the case to the District Court for further action.

In *Geary*, the court did not hesitate to squarely face the issue of whether a person could be classified as a conscientious objector by the board if his views crystallized after he had received his induction notice. The court concluded:

> "The long history of exempting conscientious objectors, coupled with the specific statutory right of appeal, indicate to us a strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious

[2] 368 F.2d 144 (2d Cir. 1966).

objectors, and indeed to grant deferments in appropriate cases. Implementation of that policy requires that any individual who raises his conscientious objector claim promptly after it matures—*even if this occurs after an induction notice is sent but before actual induction*—be entitled to have his application considered by the Local Board. *In light of this, the Local Board must first determine when an applicant's beliefs matured.* If the Board properly concludes that the claim existed before the notice was sent, the classification may not be reopened. If the Board finds, however, that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector then a change in status would have occurred 'resulting from circumstances over which the registrant had no control,' and he would be entitled to be reclassified by the Local Board." [3] (Emphasis added.)

It is clear that in the instant case, the defendant JENKINS raised his claim during the period when *Geary* was controlling in this circuit.[4] However, the

[3] *Id.* at 150. Other circuits had reached an opposite conclusion. *See e.g., Ehlert* v. *United States*, 422 F.2d 332 (9th Cir. 1970); *United States* v. *Al-Majied Muhammad*, 364 F.2d 223 (4th Cir. 1966); *Davis* v. *United States*, 374 F.2d 1 (5th Cir. 1967); *United States* v. *Taylor*, 351 F.2d 228 (6th Cir. 1965).

[4] *Geary* was decided on October 21, 1966 and remained in effect until the Supreme Court's decision in the *Ehlert* case, which decision was handed down April 21, 1971. The facts in this case clearly indicate that Jenkins comes within the "pre-Ehlert" period.

local board did not consider Jenkins' claim, as provided for under *Geary*, and he was denied a postponement of his scheduled induction. The defendant JENKINS did not report for induction on February 24, 1971, and it is for that reason that he is before this court under indictment.

The defendant urges that the "lawless" action of the Board, in not considering his claim, should not be a basis for penalizing him, for he had been "acting consistently with applicable decisional law." The Government, in their original memorandum, maintained that the case of *United States* v. *Ehlert*, 402 U.S. 99 (1971), is retroactive, and "the local board need not consider post-induction conscientious objector claims." More recently, the Government in an effort to supplement their original argument of retroactivity, contends that the ruling in *Geary* was clearly erroneous and as such the local boards were not obligated to follow its mandates. Such a ruling has not been made in the Second Circuit.

This court is aware that from April 21, 1971, the day *Ehlert* was decided, the Local Selective Service Boards do not have to entertain claims allegedly arising within the period between the mailing of a notice of induction and the scheduled induction date. The Government, in an effort to support their contention that the local board was not bound by *Geary*, refers this court to the following cases: *Capobianco* v.

Melvin Laird;[5] *United States* v. *Nordlof*, 454 F.2d 739 (7th Cir. 1971); *United States* v. *Collins*, 445 F.2d 653 (9th Cir. 1971); *United States* v. *Hand*, 443 F.2d 826 (9th Cir. 1971); *United States* v. *Kilby*, 446 F.2d 1002 (5th Cir. 1971); and *United States* v. *McKee*, 446 F.2d 974 (4th Cir. 1971). Significantly, only one of the above mentioned cases was decided in our circuit and this court will, therefore, rely primarily on that case.

In *Capobianco*, *supra*, the Second Circuit initially applied the *Geary* rule and thereby reversed an order of the district court which had denied an application from a member of the Armed Forces for a writ of habeas corpus. The applicant sought to have his conscientious objector claim considered by the Local Board, even though he had raised it after he had received his induction notice. The Court of Appeals for the Second Circuit, in light of *Geary*, directed the district court to issue the writ. Thereafter, in a subsequent order, the same court reversed its earlier order and affirmed the district court's denial of a writ of habeas corpus. The basis of this subsequent order was the decision of the Supreme Court in the *Ehlert* case. While it appears that this second order lends support to the proposition that *Ehlert* is retroactive, we must not overlook the fact that *Capobianco* involved a soldier already in the Army who would not be subject to criminal penalties by the retroac-

[5] *Capobianco* v. *Melvin Laird*, 424 F.2d 1304 (2d Cir. 1971), was vacated by a subsequent order of the Second Circuit dated July 1, 1971. (69-C-1039)

tive application of *Ehlert*.[6] In the case at bar, the retroactive effect of *Ehlert* would be to render illegal the conduct of Jenkins, when at the time he pursued this course it was incumbent upon the local board to consider his claim prior to induction.

It is well settled, that where contrary rulings have been made in other circuits, this court would be permitted, in the absence of any decisional guidance from our own circuit, to chart its own course. However, the Geary case was decided by our circuit and, therefore, this court is constrained to abide by its teachings. Further, even accepting *arguendo* that this court would follow the ruling of a foreign circuit, the *Nordlof* case, *supra*, would not be of any aid to the Government in its contention that *Ehlert* is retroactive. In that case, the settled law of the circuit at the time when *Nordlof* refused induction was that § 1625.2 did not allow post-induction notice claims to be heard by the Board.[7] Thus, the defendant would not be prejudiced by a retroactive application of *Ehlert*, for it would only serve to affirm the settled law of the circuit. It cannot be overemphasized that the decisional law of this circuit, when Jenkins refused induction, was that the Board was obligated to entertain his claim and pass upon it. Similarly, the *Collins*, *Hand*, *Kilby*, and *McKee* cases,

[6] This court is of the opinion that the language in the *Ehlert* case does not in and of itself support the contention that the Supreme Court's ruling is to be applied retroactively in all cases.

[7] *See Porter* v. *United States*, 334 F.2d 792 (7th Cir. (1964).

[*supra*], all involved instances where *Ehlert* was not overturning the case law as it had previously existed in those circuits.[8] Accordingly, those defendants would not be prejudiced, as the defendant JENKINS would be, by a retroactive application of *Ehlert*; when they refused induction they had not been apprised of the fact, through the interpretation of § 1625.2 in that circuit, that they would have to be heard by the Board on their claims.

This court's own research has disclosed one significant case which must be discussed, and that is *United States* v. *Johnson*, 443 F.2d 189 (2d Cir. 1971).[9] On October 9, 1969, defendant Johnson was mailed his Order to Report for Induction, which was fixed for November 9, 1969. Defendant appeared at the Board on October 17, 1969, and requested an application for conscientious objector status, which was given to him. At the same time, his induction date was postponed, "pending C.O. review." Some two months later, on December 18, 1969, the Local Board notified Johnson that it was cancelling his postponement of induction for failure to return his SSS Form 150 (for conscientious Objectors), and he was again ordered to report for induction, which he refused to do. He was later convicted for failure to report for induction into the Armed Forces, as mandated by 50 U.S.C. App. § 462(a), and his conviction was affirmed.

[8] Indeed, the law of the Fourth Circuit [*United States* v. *Al-Majied Muhammad*, 364 F.2d 223 (4th Cir. 1966)] and the Fifth Circuit [*Davis* v. *United States*, 374 F.2d 1 (5th Cir. 1967)] had been consistent with the subsequent *Ehlert* decision when the defendants refused induction in *McKee* and *Kilby*. It had been unsettled in the Ninth Circuit when the defendants refused induction in the *Collins* and *Hand* cases mentioned, *supra*. The subsequent Supreme Court *Ehlert* decision, which decided the issue adversely against the defendant, came from the Ninth Circuit, however. *See Ehlert* v. *United States*, 422 F.2d 332 (9th Cir. 1970).

In this area, consider also the recent cases of *United States* v. *Cotton*, (71-CR-935, Aug. 4, 1972), and *United States* v. *Shomock*, 462 F.2d 338 (3d Cir. 1972), which, however illuminating, are nonetheless distinguishable from the case at bar.

[9] This court does note that for some unexplained reason this case *was not* cited *by either of the parties*. Such an oversight clearly cannot go unnoticed.

While *Geary* was controlling at the time Johnson refused induction, the Court of Appeals concluded that the Local Board had not reopened Johnson's file. Specifically, the court stated that:

> ". . . it appears that all that happened was that the Board was considering whether to reopen defendant's classification, and chose not to."

The circumstances described in the *Johnson* case, *supra*, at first blush seem to be dispositive of the case at bar. Yet, a careful reading will disclose that the situation in *Johnson* differs from that in Jenkins in that Johnson was given an opportunity to be heard *via* the postponement. It was through his own delay of two months in failing to return Form 150 that subjected him again to induction after it had already been once postponed. It cannot be over-emphasized that the postponement granted Johnson was for the obvious purpose of allowing him to pursue his claim through the completion of Form 150. The defendant

in this case, on the other hand, was *denied* postponement only one day prior to his induction date; he was given no opportunity to be heard on his claim. Hence, it was not a situation as in *Johnson*, where the late filing of Form 150 would serve to ". . . indefinitely . . . postpone his duty to report." *United States* v. *Johnson*, 443 F.2d 189, 192 (2d Cir. 1971).

In closing, this court must emphasize that its decision with respect to the defendant must not be overread. In this case, Jenkins would be clearly prejudiced by any attempt to apply, retroactively, the Supreme Court's decision in *Ehlert*. This court cannot permit the criminal prosecution of the defendant under these circumstances without seriously eroding fundamental and basic equitable principles of law. This is not to say, however, that under other circumstances a retroactive reading of *Ehlert* would not be warranted.

CONCLUSIONS OF LAW

1) The indictment in this case is dismissed and the defendant is discharged.

2) The conclusion of this court is not to be construed as relieving this defendant of his obligation under the Uniform Military Training & Service Act. Local Board No. 50 is directed to reopen the case of this defendant to consider his application for C.O. status in accordance with the regulations.

/s/ Anthony J. Travia
U. S. D. J.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of December one thousand nine hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD
HON. HENRY J. FRIENDLY
HON. WILFRED FEINBERG
Circuit Judges

73-1572

THE UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT

v.

RONALD S. JENKINS, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from judgment of said District Court be and it hereby is dismissed for lack of appellate jurisdiction in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by /s/ Vincent A. Carlin
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the SIXTH day of February, one thousand nine hundred and seventy four.

Present:

HON. J. EDWARD LUMBARD
HON. HENRY J. FRIENDLY
HON. WILFRED FEINBERG
Circuit Judges

Docket No. 73-1572

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT

vs.

RONALD S. JENKINS, DEFENDANT-APPELLEE

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

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